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REMARKS OF FREDERICK L. FEINSTEIN
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BEFORE THE NLRB 60TH ANNIVERSARY CONFERENCE
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Thank you Jim Gross and good morning to you all on behalf of the Office of the General Counsel of the National Labor Relations Board.

It is fitting that this 60th anniversary conference should be sponsored by the Board in conjunction with Cornell University and its School of Industrial and Labor Relations. Not only has Cornell's Jim Gross provided us with his multi-volume history of the Board, but also, as some of you may know, the classic study of the origins of my own office -- former Board Solicitor Ida Klaus's article "The Taft-Hartley Experiment in Separation of NLRB Functions" -- was published in Cornell's Industrial and Labor Relations Review.¹

The stream of scholarship that has flowed to us from Cornell is part of the background for this Conference. In the foreground is an opportunity for practitioners and scholars to reflect together on where we have come from in order that we may have a better understanding of where we are now and where we need to go. In that spirit, I intend, both this morning and in tomorrow's panel discussion, to give you some snap shots illustrating how we are endeavoring to carry on the traditions of the Office of the General Counsel.

¹ Ida Klaus, *The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 Ind. & Lab. Rel. Rev. 371 (1958).

The Office of the General Counsel took its present form 48 years ago when the Taft-Hartley Congress decided to lodge final and unreviewable authority in the General Counsel to decide whether or not to issue an unfair labor practice complaint on behalf of the Board. Taft-Hartley's new Section 3(d) has from time to time made the Office of the General Counsel a flashpoint of controversy.

General Counsels have generally agreed that where the National Labor Relations Board has not clearly spoken on a serious issue of national labor policy, the General Counsel should exercise prosecutorial discretion in a way that allows the unresolved issue to be presented to the Board for decision. As was argued at a symposium on the occasion of the Board's 25th anniversary, if there is reasonable doubt about the meaning of the law, issuance of a complaint aimed at clarifying the rights of the disputants promotes stability in the law and serves the interest of aggrieved parties in ensuring that reasonable claims receive a fair hearing.²

Conversely, General Counsels have generally agreed -- although charging parties have not -- that where the National Labor Relations Board has clearly decided an issue of national labor policy, the General Counsel, who prosecutes on behalf of the Board, normally should not issue a complaint based on a contrary view of national labor policy. The ability of the Office of the General Counsel to bring a final definitive closure to disputes governed by settled Board law has long been thought one of our statute's virtues. Of course there may be exceptions where decisions and commentary suggest that the Board may wish to change existing law, and in those situations General Counsel's have issued complaints to give the Board that opportunity.

The prosecutorial guidelines just summarized were not without controversy in their inception. And they have proved to be perennial sources of controversy in their application. For example, Rosemary Collyer's refused to challenge the historic UAW-General Motors Saturn agreement on the ground that Board and court decisions recognized the right of employees at one facility to negotiate contingent bargaining rights either at a new facility or at one to which employees might transfer.³ But there were critics at the time who suggested that the Saturn issue should at least have been put to the Board for decision.⁴

² Kenneth C. McGuiness, *Effect of the Discretionary Power of the General Counsel on the Development of the Law*, 29 Geo. Wash. L.Rev. 385, 397 (1960).

³ General Motors Corp., Saturn Corp., NLRB Advice Mem., 7-CB-6582, 13 AMR ¶23090 (June 2, 1986), citing Fraser & Johnston Co., 189 NLRB 142, 143, 151 (1971), enf'd. 469 F.2d 1259, 126263 (9th Cir. 1972); Kroger Co., 219 NLRB 388 (1978).

⁴ Samuel Estreicher, *Win-Win Labor Law Reform*, 10 The Labor Lawyer 667, 670-671 & n. 12 (1994).

The judgment of Peter Nash was that the plain language of the construction industry proviso to Section 8(e) -- together with Board decisions construing it -- warranted his refusal to issue a complaint in a Texas construction case.⁵ That did not save him from criticism in the Connell Construction case when the same statutory issue was presented to the Fifth Circuit in an antitrust context.⁶ And, by a 5-4 vote in Connell, the Supreme Court ultimately rejected the reading of the statute upon which Mr. Nash's dismissal was based.⁷ Reacting to the criticism of the General Counsel's declining to prosecute, John Irving authorized a number of complaints based on a broad reading of the Supreme Court's decision in Connell. His reward was to have his arguments rejected by a unanimous Board and a unanimous Supreme Court in the Woelke & Romero case.⁸ So it goes. In the polarized world of labor relations, unlike the fairy tales of our youth, the porridge seems always to be either too hot or too cold and never just right.

I have briefly reviewed these controversies faced by my predecessors to make a more basic point. The National Labor Relations Act, as amended from time to time, has for 60 years provided a framework for addressing the labor relations problems facing an economy undergoing constant change. In its entire history, the Board has never had the power to initiate unfair labor practices cases on its own. All the controversial disputes that have engaged General Counsels exercising their prosecutorial discretion are in our offices for only one reason: some private citizen -- individual, employer, or union -- has brought the controversy to us and asked the General Counsel to intervene. The problems they have brought have differed over time because the times are different and the parties' interests change with the times. Our responses to these problems have also differed, at least at the margins, because each General Counsel has had a different sense of what the times need -- a sense honed and refined by meetings just like this one at which persons who know our work and understand our mission give us the benefit of their judgment. It is by this process that the National Labor Relations Act has constantly renewed itself and remained relevant to the industrial relations community.

I speak to you at a time when the role of government is the subject of furious debate. I speak to you when we, like other agencies, must justify as never before our claim to receive scarce tax dollars. It is a difficult time to be in government and the difficulties are by no means over. But one of the truly gratifying aspects of the painful summer that followed the House of Representatives proposing to cut our annual appropriation by 30% was that so many of the Agency's customers -- employers, unions, and individuals -- have come forward to support the Agency's mission. The message that after 60 years the National Labor Relations Act still serves the needs of the industrial relations community was delivered to the Senate by many different

⁵ Report on Case-Handling Developments at NLRB (Quarter Ending March 31, 1974), reprinted in 1974 Labor Relations Yearbook (BNA) 280, 298-308.

⁶ Connell Const. Co., Inc. v. Plumbers & Steam Loc. U. No. 100, 483 F.2d 1154, 1158, 1174-1175 (5th Cir. 1974), revsd. on other grounds, 421 U.S. 616 (1975).

⁷ Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 626-635 (1975).

⁸ Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982).

voices in that community and with good effect. I hope they will continue to be heard in the difficult months ahead.

The support that the Agency has received recently, as in the past, has not come because our supporters agree with everything we have done. They do not. And in the nature of things, they cannot. Every prosecutorial decision made by the General Counsel disappoints someone. And in the hard cases that each General Counsel has been called upon to decide -- the ones where the issues are both important and unclear and the parties on all sides hold firmly, even passionately, to opposing views -- it sometimes appears that we disappoint everyone to some extent. What has crystallized support for the Agency, however, is a shared recognition that now, as before, we approach the cases that come before us with a sense of professional responsibility to enforce the Act.

Like my predecessors, I cannot expect universal agreement with my priorities, much less with each individual decision I make. But like them, I recognize an obligation to make decisions that are a reasoned attempt to give effect to the policies expressed in the statute itself. Like them, I feel an obligation to take seriously the criticisms that are made about the performance of my office and to ensure that the Office of the General Counsel is now, as in the past, a responsible steward of the powers entrusted to it. To that end, one of my purposes at this conference is to discuss with you how I have approached the issue of injunctive relief under the Act -- a matter that has recently been the object of some scrutiny.

As you are surely aware, the current Board has heeded the views of commentators who have long argued that the remedy of the Section 10(j) interim injunction was being underutilized.⁹ Section 10(j) was enacted to ensure that prompt interim relief would be available in cases that cannot be effectively remedied if they must await a court order in the normal course.

Although my predecessors endorsed the policy of using §10(j) to protect the efficacy of the Board's ultimate order, utilization of this remedy among the Regional offices varied significantly. Prior to 1994, relatively few offices accounted for the bulk of authorized cases and some Regions submitted no cases to Washington for consideration of §10(j) relief.

As part of my §10(j) initiative, for the first time in the Agency's history, we prepared and distributed a §10(j) Manual and we conducted training for Regional personnel devoted to investigating and litigating §10(j) cases. With this intensive educational program, it is not surprising that the number of §10(j) authorizations increased. Regional offices that had not

⁹ Catherine Hodgman Helm, *The Practicality of Increasing the Use of NLRA Section 10(j)*, 7 Ind. Rel. L.J. 599, 640-654 (1985); Note, *The Case for Quick Relief: Use of Section 10(j) of the Labor-Management Relations Act in Discriminatory Discharge Cases*, 56 Ind. L.J. 515, 518-522 (1981); Comment, *Section 10(j) of the National Labor Relations Act: A Legislative, Administrative and Judicial Look at a Potentially Effective (But Seldom Used) Remedy*, 18 Santa Clara L. Rev. 1021 (1978); Donald J. Siegel, *Section 10(j) of the National Labor Relations Act: Suggested Reforms for an Expanded Use*, 13 B.C. Indus. Com. L. Rev. 457 (1972).

considered §10(j) as a potential remedy are doing so now. Section 10(j) authorizations are more evenly distributed among Regional offices now than they were before the initiative began. This largely accounts for the increase in the number of 10(j) cases -- exactly as was predicted by a commentator who long ago argued that potential 10(j) cases were being overlooked because the Board did not have a program of systematically and uniformly evaluating each case under its own 10(j) guidelines.¹⁰

The result of that program is that, even though 10(j) cases still constitute only a miniscule fraction of our caseload (about three percent of the total number of unfair labor practice complaints issued, up from a little over one percent in recent years), we are filing more §10(j) cases.

The increase in the number of our 10(j) cases has led some critics to claim, or at least suspect, that we are able to reach these numbers only by improperly cutting procedural and substantive corners. I wish to assure you all that that is not so. Our regional offices understand that they are to conduct a thorough analysis of the facts and law supporting the alleged violation and the proffered defenses and to articulate with reference to facts and law the reasons why interim relief is necessary and a Board order in due course is insufficient.

The clarity of the facts is an important factor in our 10(j) decisions and I have declined to seek 10(j) relief in cases that present particular merits problems. For example, in one recent case involving a successor employer's refusal to bargain with a union, we declined to seek authorization because there was conflicting evidence as to who had represented the employees of the predecessor.

The decision to seek §10(j) authorization involves not only a judgment about the strength of the unfair labor practice allegations but also about the need for injunctive relief if those allegations prove true. For example, I have declined to seek §10(j) authorization in cases involving discriminatory denial of access to private property, when the Union has effective alternative means of communicating at the site by handbilling or picketing on public property. Evidence of alternative means of communication is not relevant to the merits where disparate treatment is the theory of our complaint. It is relevant, however, to our deciding whether injunctive relief is necessary. At the present time, the state of the law regarding discriminatory denial of access to non-employees is somewhat uncertain. At least during this period of legal uncertainty, I believe that if alternative means of communication are available, 10(j) injunctive relief commanding access to private property is not necessary to maintain the status quo pending the Board's adjudication of the discrimination claim.

In a similar vein, I am particularly sensitive to the need for a careful analysis in cases involving operational changes such as subcontracting, relocation or partial closure. The rapid changes in our economy seem to have brought us more of these cases. They are fact intensive and the restoration remedy we seek is likely to be significant to a respondent. It is thus

¹⁰ Note, *The Case for Quick Relief: Use of Section 10(j) of the Labor-Management Relations Act in Discriminatory Discharge Cases*, 56 Ind. L.J. 515, 524-528, 531, 539 (1981).

particularly important that we evaluate the evidence regarding the asserted defenses to the unfair labor practice charges and to any claims that restoration would be unduly burdensome.

Like General Counsel's before me, I have lost some 10(j) cases and my critics cite each loss as evidence that our 10(j) program as a whole is illegitimate. In my judgment, an impressionistic "inspection by sample" approach is not a fair or accurate method for measuring the integrity of our 10(j) program. It is inevitable that there will be some losses. A fairer measure of the integrity of a 10(j) program is the Agency's overall success rate. On that score I find it significant that the success rate of our 10(j) program this past year -- 89% as of the end of Fiscal 95 -- is similar to the Agency's success rate in former years. I am particularly pleased that in the cases that did not settle and had to be fully litigated in federal district court, we won 31 cases and lost only 9.

That concludes my remarks this morning. Thank you for this opportunity to welcome you. I look forward to discussing these issues with you further during the remainder of the conference.

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